

1 KAMALA D. HARRIS
Attorney General of California
2 TIMOTHY R. PATTERSON
Supervising Deputy Attorney General
3 State Bar No. 72209
SUSAN L. DURBIN
4 Deputy Attorney General
State Bar No. 81750
5 110 West A Street, Suite 1100
San Diego, CA 92101
6 P.O. Box 85266
San Diego, CA 92186-5266
7 Telephone: (619) 645-2013
Fax: (619) 645-2012
8 E-mail: Tim.Patterson@doj.ca.gov
Susan.Durbin@doj.ca.gov
9 *Attorneys for Intervenor*
People of the State of California ex rel.
10 *Kamala D. Harris, Attorney General*

11
12 SUPERIOR COURT OF THE STATE OF CALIFORNIA
13 COUNTY OF SAN DIEGO, CENTRAL DIVISION
14

15 **CLEVELAND NATIONAL FOREST**
16 **FOUNDATION and CENTER FOR**
17 **BIOLOGICAL DIVERSITY,**

18 Plaintiffs and Petitioners,

19 v.

20 **SAN DIEGO ASSOCIATION OF**
GOVERNMENTS; SAN DIEGO
21 **ASSOCIATION OF GOVERNMENTS**
BOARD OF DIRECTORS; and DOES 1
22 **through 20, inclusive,**

23 Defendants and Respondents.

24
25 **PEOPLE OF THE STATE OF**
CALIFORNIA *ex rel.* KAMALA
26 **D. HARRIS, ATTORNEY GENERAL,**

27 Intervenor.
28

Case No. 37-2011-00101593-CU-TT-CTL

IMAGED FILE

AMENDED OPENING BRIEF IN
SUPPORT OF THE PEOPLE'S
PETITION FOR WRIT OF MANDATE
IN INTERVENTION

Date: November 30, 2012

Time: 1:30 p.m.

Dept: C-72

Judge: The Hon. Timothy B. Taylor

Trial Date: November 30, 2012

Action Filed: November 28, 2011

**CREED-21 and AFFORDABLE HOUSING
COALITION OF SAN DIEGO COUNTY,**

Petitioners,

v.

**SAN DIEGO ASSOCIATION OF
GOVERNMENTS; and DOES 1 through
100, inclusive.**

Respondents.

Case No. 37-2011-00101660-CU-TT-CTL

TABLE OF CONTENTS

	Page
Introduction	1
Statement of Facts	2
I. Environmental Setting of the Project	2
II. Procedural History / Summary of the RTP	4
III. Legal Challenge	6
Standard of Review	6
Argument	7
I. The FEIR fails to disclose the RTP/SCS's serious air pollution impacts and fails to adopt all feasible air pollution mitigation measures, in violation of CEQA	7
A. The fact that the San Diego air basin does not currently violate the federal minimum air quality standards for particulate matter does not relieve SANDAG of its duty to disclose and analyze whether the additional emissions of particulate matter will cause the basin to suffer a significant impact on its air quality	8
B. The FEIR does not adequately analyze or disclose the effects of the RTP/SCS's particulate emissions on the State's more stringent and health-protective air quality standards or how and to what extent such emissions will impact public health	12
C. The FEIR fails to fully analyze and disclose potential harm to populations that it recognizes are sensitive receptors to air pollution.	14
1. Sensitive receptors will experience an increased and increasing potential for exposure to elevated levels of diesel particulate emissions.	16
2. The FEIR does not make the legally required connection between elevated risk of exposure to diesel particulates and health impacts on sensitive receptors.	17
3. The seriousness of the potential health effects, especially for sensitive receptors, required SANDAG to discover and disclose more information; the failure is prejudicial.	18
D. The FEIR violates CEQA's mandate that agencies not approve projects with significant environmental impacts without proposing and adopting all feasible mitigation	19
II. SANDAG has failed to properly disclose and mitigate the significant adverse impacts of the RTP/SCS on greenhouse gas emissions and global warming.	22
A. Greenhouse gas emissions pose a serious problem.	22
B. The State has established clear objectives to address increases in greenhouse gas emissions	23

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF CONTENTS
(continued)

	Page
C. The RTP/SCS is inconsistent with the State’s ghg reduction objectives and its impacts are therefore significant under CEQA	25
D. SANDAG has failed to adopt all of the feasible mitigation measures available to it as the lead agency preparing a programmatic FEIR for such a large-scale and long-term project as the RTP/SCS	27
1. SANDAG has the ability to adopt alternatives and impose mitigation.	28
2. SANDAG cannot avoid or defer its CEQA obligations simply because the FEIR is a programmatic document.	29
3. SANDAG has failed to fully analyze and impose feasible mitigation for GHG impacts.....	29
Conclusion	31

TABLE OF AUTHORITIES

Page

CASES

<i>Bakersfield Citizens for Local Control v. City of Bakersfield</i> (2004) 124 Cal.App.4th 1184	13, 17, 18
<i>Berkeley Keep Jets Over the Bay v. Port of Oakland</i> (2001) 91 Cal.App.4th 1344	13, 18
<i>Cadiz Land Company, Inc. v. County of San Bernardino</i> (2006) 83 Cal.App.4th 74	19
<i>Californians for Alternatives to Toxics v. Department of Food & Agriculture</i> (2005) 136 Cal.App.4th 1	10
<i>Christward Ministry v. County of San Diego</i> (1993) 13 Cal.App.4th 31	7
<i>City of Marina v. Board of Trustees of the California State University</i> (2006) 39 Cal.4th 341	21
<i>Communities for a Better Environment v. City of Richmond</i> (2010) 184 Cal.App.4th 70	22, 29
<i>County of Inyo v. Yorty</i> (1973) 32 Cal.App.3d 795.....	27
<i>Environmental Protection Information Center (EPIC) v. California Dept. of Forestry & Fire Protection</i> (2008) 44 Cal.4th 459	19
<i>Friends of Mammoth v. Board of Supervisors</i> (1972) 8 Cal.3d 247	6
<i>Kings County Farm Bureau v. City of Hanford</i> (1990) 221 Cal.App.3d 692.....	10, 12
<i>Laurel Heights Improvement Assn. v. Regents of the University of California</i> (1988) 47 Cal.3d 376	6, 8, 27, 31
<i>Los Angeles Unified School Dist. v. City of Los Angeles</i> (1997) 58 Cal.App.4th 1019	15

TABLE OF AUTHORITIES
(continued)

	<u>Page</u>
<i>Mann v. Community Redevelopment Agency of Hawthorne</i> (1991) 233 Cal.App.3d 1143.....	7
<i>Mira Mar Mobile Community v. City of Oceanside</i> (2004) 119 Cal.App.4th 477	7
<i>Neighbors for Smart Rail v. Exposition Metro Construction Authority</i> (2012) 205 Cal.App.4th 552	15
<i>No Oil, Inc. v. City of Los Angeles</i> (1974) 13 Cal.3d 68	11
<i>Protect the Historic Amador Waterways v. Amador Water Agency</i> (2004) 116 Cal.App.4th 1099	10
<i>Quail Botanical Gardens Foundation, Inc. v. City of Encinitas</i> (1994) 29 Cal.App.4th 1597	30
<i>Resource Defense Counsel v. Local Agency Formation Commission of Santa Cruz County</i> (1987) 191 Cal.App.3d 886.....	7
<i>Santiago County Water Dist. v. County of Orange</i> (1981) 118 Cal.App.3d 818.....	8, 27
<i>Save Our Peninsula Committee v. Monterey County Bd. of Supervisors</i> (2001) 87 Cal.App.4th 99	7, 12
<i>Save Tara v. City of West Hollywood</i> (2008) 45 Cal. 4th 116	29
STATUTES	
California Code of Federal Regulations, Title 3 § 6720 et seq.	10
California Code of Federal Regulations, Title 13 § 2025.....	20
§ 2485.....	20
§ 2701.....	20

TABLE OF AUTHORITIES
(continued)

		<u>Page</u>
3	California Code of Regulations, Title 14	
4	§ 15000.....	8
5	§ 15002.....	18
6	§ 15002(a)	8
7	§ 15064.....	14
8	§ 15064.4.....	22
9	§ 15065.....	15
10	§ 15143.....	18
11	§ 15144.....	17
12	§ 15168.....	29
13	§ 15183.5.....	30
14	§ 15370.....	20
15	§ 15444.....	18
16	§ 16064.....	26
17		
18	Title 40, C.F.R.	
19	§ 93.118.....	9
20		
21	Government Code	
22	§ 6050.....	26
23	§ 65080.....	25
24		
25	Health & Safety Code	
26	§ 38561 (h)	24
27		
28	Public Resources Code	
29	§ 20181(a)	21
30	§ 21000.....	2
31	§ 21002.....	passim
32	§ 21005.....	7, 21
33	§ 21061.....	27
34	§ 21081 (a)	20
35	§ 21083.05.....	22
36	§ 21168.....	7
37	§ 21168.5.....	7
38	§ 21168.5.....	6
39	§ 38500.....	4, 23
40	§ 38501.....	24
41	§ 38550.....	4, 24
42		
43	Public Utilities Code	
44	§ 120300.....	4
45	§ 132051.....	5

TABLE OF AUTHORITIES
(continued)

	<u>Page</u>
United States Code, Title 42	
§ 7401	8
§ 7410	8
§ 7506 (c)(1)	9
OTHER AUTHORITIES	
Air Pollution Control District	
Rule 55	20
Assessment, <i>Indicators of Climate Change in California: Environmental Justice Impacts</i> (Dec. 2010)	23
California Global Warming Solutions Act of 2006	23
Climate Change, <i>Frequently Asked Questions</i>	22
Global Warming Solutions Act of 2006	4
http://oehha.ca.gov/multimedia/epic/epic123110.html	3, 23
http://www.climatechange.ca.gov/adaptation/	3, 23
http://www.epa.gov/climatechange/science/indicators/ghg/ghg-concentrations.html	22
Resources Agency, <i>2009 Climate Adaptation Strategy</i>	23
Senate Bill 375	1
www.ipcc.ch/pdf/assessment-report/ar4/wg1/ar4-wg1-faqs.pdf	22

INTRODUCTION

The San Diego Association of Governments (SANDAG) has prepared a Regional Transportation Plan and Sustainable Communities Strategy (RTP/SCS) for the San Diego area that specifies in considerable detail, from the present until 2050, how and where San Diego residents will travel. The RTP/SCS will thereby have a profound effect on how and where San Diegans will work, shop, play and live in the coming decades. The RTP/SCS not only plans out the freeways, roadways, major surface streets, light and heavy rail, bus systems, and bicycling/walking facilities for San Diego to mid-century, it also plans whether and how to finance them. In addition, this RTP/SCS – the first completed in accordance with the requirements of Senate Bill 375 (SB 375)¹ – brings a new and wider set of objectives and requirements to transportation planning. For the first time, SANDAG must carry out its long-standing transportation planning responsibilities under the federal and state statutes, and allocate the federal, state and local tax sources that have governed that planning, in ways that reduce California’s emissions of greenhouse gases (GHGs), and that thereby reduce the real and increasing danger posed to California’s – and the world’s – climate.

Such a far-reaching and comprehensive plan has the potential for substantial environmental benefit, but it also has the potential for significant environmental harm, including damage to the quality of the air for the public at large and for persons especially sensitive to health damage from air pollution, and to the climate. The Final Environmental Impact Report (FEIR) for the RTP/SCS shows that more than a decade ago, the California Air Resources Board calculated the cancer risk from pollution from diesel engines in the San Diego area as 720 excess cases of cancer per million people. However, despite showing that potential exposure to diesel pollution will increase in many areas of the San Diego Air Basin under the RTP/SCS, the FEIR avoids ever actually determining whether that 720-in-a-million cancer risk will also increase under the Plan. With respect to GHGs, the State of California is committed to continually decreasing total annual emissions from 2010 through 2050 in order to avoid dangerous climate

¹ Stats. 2008, Ch. 728.

1 change. However, as the FEIR tells the public, overall GHG emissions will increase in 2035 over
2 2010 levels, and will increase again in 2050, sending our climate pollutant trajectory in the wrong
3 direction.

4 The California Environmental Quality Act (CEQA)² requires that any public agency that
5 undertakes a project that may significantly harm the environment must fully inform the public
6 and the agency decisionmakers as to the project's potential to damage the environment, and must
7 adopt all measures to mitigate that harm that are technically, legally, and economically feasible.
8 SANDAG has prepared and certified an FEIR to carry out CEQA's mandates. Unfortunately, the
9 FEIR fails both to provide full information about the environmental harm that will result from the
10 RTP/SCS, and to propose all feasible mitigation for those effects. It is impossible for the
11 SANDAG decision makers, or the public, to know and understand what effects SANDAG's plan
12 will have on the serious air pollution problem in San Diego, on the health of the public in general
13 and of sensitive and already overburdened populations in particular, or on the State's objectives to
14 reduce climate-changing pollution over the longer term. The FEIR is so flawed that its
15 certification by SANDAG is a violation of CEQA and an abuse of SANDAG's discretion. The
16 People of the State of California, acting through Attorney General Kamala D. Harris (the
17 "People"), entered this case to protect the public health and the environment. The People
18 therefore ask that this Court reverse SANDAG's certification of the FEIR and the approval of the
19 RTP/SCS that rests on the FEIR, and order SANDAG to prepare and certify an EIR that fully
20 complies with CEQA.

21 **STATEMENT OF FACTS**

22 **I. ENVIRONMENTAL SETTING OF THE PROJECT**

23 San Diego is one of the jewels of California. Its 4,200 square miles are comprised of
24 beautiful beaches, lush backcountry, and mountains and desert, (FEIR at 3-1; Administrative
25 Record (AR) 2141), and are home to about 3.2 million people. (AR 1031.) Despite its beauty,
26 the San Diego region currently has serious environmental problems. The area suffers from air

27 ² Pub. Resources Code, § 21000, et seq.
28

1 pollution that is among the worst in the nation. The San Diego Air Basin exceeded the health-
2 based California air quality standard for particulate matter (commonly called soot) on 22 days in
3 2010, and it exceeded the federal fine-particulate matter standard on two days. The American
4 Lung Association ranks San Diego County as having the seventh worst ozone pollution and
5 fifteenth worst particulate pollution of the nation's 277 metropolitan areas. (AR 27707, 28010-
6 12; see also FEIR at 4.3-6; AR 2214 [air basin not in attainment of state standards for ozone and
7 particulate pollution].)

8 Exposure to particulate matter at levels similar to San Diego's can cause a variety of
9 health problems: it may cause asthma, and exacerbates asthma in existing sufferers, it harms the
10 lungs, and is likely a human carcinogen. (FEIR 4.3-9-10; AR 2217-18.) The most serious health
11 risk from particulate matter pollution comes from exposure to the exhaust from diesel engines,
12 including diesel truck and bus engines. (FEIR at 4.3-9; AR 2217.) Children who are routinely
13 exposed to high levels of diesel exhaust risk lung growth damage that may affect them their
14 whole lives. (FEIR at 4.3-10; AR 2218.)

15 Nor are conventional air pollutants like particulate matter the only environmental problem
16 from which San Diego suffers, and to which transportation contributes. As the FEIR recognizes,
17 human activities that create GHG emissions are warming the world. California is already
18 experiencing a rise in sea level, coastal erosion, increased average temperatures, more extreme
19 hot days and increased heat waves, shifts in the water cycle, and increases in the frequency and
20 intensity of wildfires. (Resources Agency, 2009 Climate Adaptation Strategy at p. 3, cited in
21 Attorney General's comment letter at FEIR App. G, at G-668; AR 4430.)³

22 The harm from climate change will fall especially hard on the most vulnerable portions of
23 California's, and San Diego's, population: the urban poor, the elderly and children, traditional
24 societies, agricultural workers and rural populations. (Office of Environmental Health Hazard
25 Assessment, Indicators of Climate Change in California: Environmental Justice Impacts (Dec.
26 2010) at p. 2, cited in Attorney General's comment letter. FEIR App.G, at G-668; AR 4430.)⁴

27 ³ Climate Adaptation Strategy available at <http://www.climatechange.ca.gov/adaptation/>.

28 ⁴ Report available at <http://oehha.ca.gov/multimedia/epic/epic123110.html>.

1 Transportation was responsible for about 37% of California’s emissions of GHGs in 2008.
2 (FEIR at 4.8-3, Table 4.8-3; AR 2555.) San Diego follows that pattern, with all forms of
3 transportation in the San Diego region emitting 14.31 million of tons of GHGs in 2010, more than
4 any other source category in the region. (FEIR at 4.8-4-5, Tables 4.8-4 and 4.8-5; AR 2556-7.)

5 California has taken legislative and regulatory action to reduce its GHG emissions in the
6 state. The Global Warming Solutions Act of 2006,⁵ commonly known as AB 32, mandates that
7 California reduce its total statewide GHG emissions in 2020 to the level they were in 1990.⁶ To
8 achieve AB 32’s 2020 target, total statewide GHG emissions must be reduced by approximately
9 15 percent from baseline (2008) levels. AB 32 implements Executive Order S-03-05 (2005),
10 which set the statewide 2020 GHG reduction limit as an interim step to reducing statewide
11 emission levels in 2050 to 80 percent below 1990 levels. “The 2020 goal was established to be an
12 aggressive, but achievable, mid-term target, and the 2050 greenhouse gas emissions reduction
13 goal represents the level scientists believe is necessary to reach levels that will stabilize climate.”
14 (Air Resources Board (ARB), Scoping Plan at p. 4; AR 26142, in Tab 319, BLC Comment Letter,
15 Att. Set 1.) SB 375’s mandate that transportation planning agencies like SANDAG integrate
16 GHG reduction into their transportation planning and meet GHG reduction goals is part of
17 California’s overall strategy to reduce GHG emissions in California, including emissions from
18 cars and trucks.

19 **II. PROCEDURAL HISTORY / SUMMARY OF THE RTP**

20 It is against this backdrop that SANDAG prepared the 2050 RTP/SCS. SANDAG, a
21 council of governments comprised of the County of San Diego and the 18 cities within the San
22 Diego region, has extensive powers and responsibilities for transportation planning and funding in
23 the San Diego region. SANDAG is the federally designated Metropolitan Planning Organization
24 (MPO) for the region, and is also the Regional Transportation Commission for the region. In its
25 role as MPO, SANDAG is responsible for general transportation planning for the area (Pub. Util.
26 Code, § 120300); in the latter role, it is responsible for preparing and adopting the regional

27 ⁵ Health & Saf. Code, § 38500, et seq.

28 ⁶ Health & Saf. Code, § 38550.

1 transportation plan (RTP) for the San Diego region. (Pub. Util. Code, § 132051.) No federal
2 funds may be used for a project unless it appears on the RTP's priority project list. Also in its
3 role as the Regional Transportation Commission, SANDAG is responsible under SB 375 for
4 preparing, adopting, and carrying out a Sustainable Communities Strategy (SCS) for the San
5 Diego region. The purpose of an SCS is to align regional transportation, housing, and land use
6 plans in order to reduce GHG emissions associated with passenger vehicle driving. (AR 2070.)
7 SANDAG prepared the RTP and the SCS together, as one document, to govern transportation
8 planning and funding between now and 2050. SANDAG's SCS is also significant because it is
9 the first to be adopted under SB 375, and may set the model for future SCSs. SANDAG prepared
10 and certified an FEIR for the RTP/SCS; the adequacy under CEQA of that FEIR is the subject
11 matter of this litigation.

12 The RTP/SCS continues the pattern of expanding highways and freeways that has
13 dominated transportation planning in the region; the RTP/SCS plans to build or contribute
14 funding to projects that will expand or extend hundreds of miles of freeways in the San Diego
15 region. These projects include expansions of the I-5, I-8, I-15, I-805, SR-52, SR-56, SR-94 and
16 SR-125. (FEIR at 2-46 through 51; AR 2116-21; RTP Tech App. 7 at TA 7-7, AR 14217; RTP
17 Tech App. 7 at TA 7-4; AR 14214.) The amount of driving expected under the RTP/SCS, termed
18 "vehicle miles traveled" or VMT, will increase by more than 50 percent over the life of the Plan.
19 (FEIR, App. G, at G-674; AR 4436.) The expected increase in driving is not due solely to
20 increases in population in the San Diego area; people will drive more on a per capita basis in
21 2050 than they do now. (FEIR, App. G, at G-673, Tables 2,3; AR 4435.)

22 The FEIR projects that cancer-causing particulate matter pollution will go up 40-45%
23 between now and 2050. (FEIR at 4.3-29, Table 4.30-5, AR 2237.) There will also be more
24 potential for high localized exposure to particulate matter emissions, especially diesel particulate
25 emissions, with the number of freeway segments with "high" exposure to particulate emissions
26 more than doubling between 2010 and 2050. (FEIR at 4.3-47, Table 4.3-8; AR 2255.) In
27 addition, the RTP/SCS will result in total annual GHG emissions that increase after 2020, and
28

1 will be higher overall in 2050 than they were in 2010. (FEIR at 2-34; AR 2104; FEIR at 4.8-25;
2 AR 2577.)

3 On October 28, 2011, SANDAG conducted a public hearing on the proposed Project and
4 FEIR. (AR 29240-338.) On that day, the SANDAG Board of Directors adopted Resolution Nos.
5 2012-08 and 2012-09, certifying the FEIR and approving the Project. (AR 223-24.) The same
6 day, SANDAG also filed a Notice of Determination for the FEIR and the Project. (AR 1-3.)

7 **III. LEGAL CHALLENGE**

8 Petitioners Cleveland National Forest Foundation (CNFF) and Center for Biological
9 Diversity (CBD) timely filed a Petition for Writ of Mandate and Complaint for Injunctive Relief
10 challenging SANDAG's October 28, 2011 actions to approve the RTP/SCS, and to certify the
11 FEIR, alleging violation of CEQA. On the same date, CREED-21 and the Affordable Housing
12 Coalition of San Diego County filed a separate action, Case No. 37-2011-00101660, challenging
13 the Plan and FEIR. On January 23, 2012, Petitioners CNFF and CBD filed a First Amended
14 Petition for Writ of Mandate and Complaint for Injunctive Relief, adding Sierra Club as a
15 Petitioner.

16 On January 23, 2012, the California Attorney General moved to intervene in the
17 CNFF/CBD CEQA action on behalf of People of the State of California. On January 25, 2011,
18 the Court granted the People's application. On April 9, 2012, the cases were consolidated for all
19 purposes.

20 **STANDARD OF REVIEW**

21 The "foremost principle under CEQA is that the Legislature intended the act 'to be
22 interpreted in such manner as to afford the fullest possible protection to the environment within
23 the reasonable scope of the statutory language.'" (*Laurel Heights Improvement Assn. v. Regents*
24 *of the University of California* (1988) 47 Cal.3d 376, 390, quoting *Friends of Mammoth v. Board*
25 *of Supervisors* (1972) 8 Cal.3d 247, 259.) A court reviews an agency's action under CEQA for a
26 prejudicial abuse of discretion, (Pub. Resources Code, § 21168.5), and such "[a]buse of discretion
27 is established if the agency has not proceeded in a manner required by law or if the determination
28

1 or decision is not supported by substantial evidence.” (*Mira Mar Mobile Community v. City of*
2 *Oceanside* (2004) 119 Cal.App.4th 477, 486.)

3 Where the adequacy of an EIR is at issue, the reviewing court does not pass upon the
4 correctness of the EIR’s environmental conclusions, but only upon its sufficiency as an
5 informative document. (*Mann v. Community Redevelopment Agency of Hawthorne* (1991) 233
6 Cal.App.3d 1143, 1148-49.) The court will not substitute its judgment for that of the agency.
7 (*Christward Ministry v. County of San Diego* (1993) 13 Cal.App.4th 31, 40.) However, abuse of
8 discretion is established where an EIR does not comply with the procedures required by the
9 statute. (Pub. Resources Code, §§ 21168 and 21168.5.)

10 If abuse of discretion has occurred, that abuse may be found to be prejudicial even if the
11 public agency contends that it would have reached the same decision on the project had it fully
12 complied with CEQA. (Pub. Resources Code, § 21005, subd. (a); *Resource Defense Counsel v.*
13 *Local Agency Formation Commission of Santa Cruz County* (1987) 191 Cal.App.3d 886, 897-
14 898.) The court must “ensure strict compliance with the procedures and mandates of the statute.”
15 (*Save Our Peninsula Committee v. Monterey County Bd. of Supervisors* (2001) 87 Cal.App.4th
16 99, 118, citation omitted.)

17 ARGUMENT

18 **I. THE FEIR FAILS TO DISCLOSE THE RTP/SCS’S SERIOUS AIR POLLUTION IMPACTS** 19 **AND FAILS TO ADOPT ALL FEASIBLE AIR POLLUTION MITIGATION MEASURES, IN** 20 **VIOLATION OF CEQA**

21 The RTP/SCS will be implemented in the San Diego Air Basin, a basin whose air pollution
22 problem is already critical. As noted in the Statement of Facts, the basin regularly exceeds state
23 health-based standards for particulate matter. The San Diego area was ranked by the American
24 Lung Association in 2011 as having the fifteenth worst particulate pollution problem in the
25 nation. (AR Tab 319, BLC Comts, Attachmt. Set 2, at 21708, 21706.) The area also has a history
26 of failing to meet applicable air quality objectives. The San Diego Air Pollution Control District
27 (APCD) stated in its 2009 Regional Air Quality Strategy (RAQS) that it did not consistently met
28 the Health and Safety Code’s 5% per year ozone reduction target during any year during the
2003-2006 time period, and that the APCD expected reductions of only about 3% per year during

1 the 2006-2009 time period. (San Diego APCD 2009-RAQS, AR Tab 210, at 17520.) As
2 described above, these pollutants cause very serious health problems and lead to excess deaths.

3 Given these existing, serious air quality problems, and the fact that the RTP/SCS will add
4 to them, SANDAG had an obligation under CEQA to discuss with some particularity how the
5 project is expected to impact public health – who will be impacted, in what ways, and to what
6 extent. SANDAG also had an obligation to analyze and impose feasible mitigation. Its failure to
7 do either violates CEQA.

8 **A. The Fact that the San Diego Air Basin Does Not Currently Violate the**
9 **Federal Minimum Air Quality Standards for Particulate Matter Does Not**
10 **Relieve SANDAG of its Duty to Disclose and Analyze Whether the**
11 **Additional Emissions of Particulate Matter Will Cause the Basin to Suffer**
12 **a Significant Impact on its Air Quality**

13 The first duty of a CEQA document is full environmental disclosure. (Pub. Resources
14 Code, §§ 21002., subd. (a), 21061; Cal. Code Regs., tit. 14 (CEQA Guidelines),⁷ §§ 15002(a),
15 15121.) Such disclosure will “alert the public and its responsible officials to environmental
16 changes before they have reached ecological points of no return.” (*Santiago County Water Dist.*
17 *v. County of Orange* (1981) 118 Cal.App.3d 818, 822.) By focusing on a federal “conformity”
18 analysis for air pollution, rather than providing useful information about expected health impacts
19 from the pollution caused by the project, the FEIR fails this duty as to the environmental and
20 public health effects that may result from increased particulate matter emissions resulting from
21 the RTP/SCS.

22 The FEIR’s air quality analysis is built around what is called the “conformity”
23 determination made by SANDAG. This is a finding that the RTP/SCS will not interfere with
24 California’s overall plan to meet and maintain the minimum federal air quality standards. Under
25 the federal Clean Air Act, 42 U.S.C. § 7401, et seq., every state must develop a plan to meet and
26 maintain the federal minimum air quality standards. (42 U.S.C. § 7410.) The Clean Air Act

27 ⁷ The State CEQA Guidelines are regulations to implement CEQA adopted by the
28 Resources Agency, and are found at Cal. Code of Regs., tit. 14, § 15000, et seq. The California
Supreme Court has held that “courts should afford great weight to the Guidelines” (*Laurel
Heights Improvement Assn. v. Regents of the University of Calif.* (1988) 47 Cal. 3d 376, 392, nt.
2.) Hereafter, these regulations will be cited as “Guidelines, § ____.”

1 supports these state clean air plans in part by requiring that any project that uses federal funds
2 must be found to be “in conformity” with the clean air plan of the state where it is undertaken, or
3 the federal government may not fund or approve the project. (42 U.S.C. § 7506, subdivision
4 (c)(1); 40 C.F.R. § 93.118.) In order to adopt the RTP/SCS and receive federal funding,
5 SANDAG was required to make a federal conformity determination for the car and truck
6 emissions that the RTP/SCS would enable and support. It made the conformity determination in
7 Appendix B to the RTP/SCS. (AR 13466, 13467.)

8 However, the federal conformity determination, by itself, does not guarantee that the
9 RTP/SCS will not have a significant adverse effect on air quality in the San Diego Air Basin.
10 First, a conformity determination is only required for pollutants for which an air basin already
11 exceeds the federal air quality standards (called nonattainment areas) and has been so designated
12 by the U.S. EPA, or for pollutants that came into compliance with the federal standards since
13 1990 (called maintenance areas, since their compliance with the federal standards must be
14 maintained). (FEIR at 4.3-15, AR 2223.) The San Diego Air Basin is currently in nonattainment
15 for (i.e., exceeds) the federal standard for ozone and has been so designated, (FEIR at 4.3-6; AR
16 2214), and so SANDAG was required to make a conformity determination for the RTP/SCS as to
17 ozone and the pollutants that are precursors to ozone. SANDAG found the RTP/SCS to be in
18 conformity for these pollutants. (*Id.*)

19 Relying only on a conformity analysis may cause a lead agency to fall short in its required
20 analysis and disclosure of serious air pollutants that may cause substantial impacts, as required by
21 CEQA. Crucially for this case, the San Diego Air Basin has not been formally designated by U.S.
22 EPA as in nonattainment for the federal standard for particulate matter, either for coarse
23 particulate matter, called PM₁₀, or for the smaller and more toxic fine particulate matter, called
24 PM_{2.5}.⁸ (FEIR at 4.3-19; AR 2227.) San Diego is also not a maintenance area for these
25 pollutants; it is currently designated as not classifiable for particulate matter. This means that

26
27 ⁸ These terms correspond to the size of the particles that make up the type of particulate
28 matter involved. PM₁₀ is comprised of particles ten microns or smaller in diameter, while PM_{2.5}
is comprised of particles two and a half microns or smaller in diameter.

1 SANDAG was not required under federal law to make a conformity determination for the
2 RTP/SCS as to either PM10 or PM2.5, and SANDAG did not do so. (FEIR at 4.3-7; AR 2215.)
3 SANDAG's conformity determinations for the RTP/SCS do not address particulate matter at all
4 and, accordingly, there is a dearth of information in the FEIR about this serious air pollutant.
5 (FEIR at 4.3-21, Table 4.3-3, AR 2229; and 4.3-22, Table 4.3-4, AR 2230.)

6 Second, a bare finding of conformity does not explain what the RTP/SCS's actual effects
7 on the ambient air will be, only that the RTP/SCS conforms to federal law. CEQA demands more
8 than mere reliance compliance with regulations, even regulations that are designed to protect the
9 environment and human health. CEQA is not simply a checklist of applicable regulatory
10 requirements. (*Protect the Historic Amador Waterways v. Amador Water Agency* (2004) 116
11 Cal.App.4th 1099, 1108-09 [environmental effect may be significant despite compliance with
12 requirement].) For example, the court in *Californians for Alternatives to Toxics v. Department of*
13 *Food & Agriculture* (2005) 136 Cal.App.4th 1, 16, held that even though the Department of
14 Pesticide Regulation's (DPR) program to test and register pesticides was designed to ensure safe
15 use of these chemicals, the EIR on a specific plan to control an agricultural pest must analyze the
16 potential effects on the environment of pesticide use. The court held that "sole reliance on DPR's
17 registration of pesticides and its regulatory program, including safety regulations for employees
18 handling pesticides (Cal. Code Regs., tit. 3, § 6720 et seq.), is inadequate to address
19 environmental concerns under CEQA." Even a project that complies with all other regulatory
20 mandates is subject to CEQA's full disclosure requirements and, if the project's impacts are
21 significant despite compliance with all other regulatory mandates, CEQA's mitigation
22 requirements. (See, e.g., *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d
23 692, 716 [permit applicant could not rely on conformance with local air district rules to establish
24 that project would have no significant impact for CEQA purposes.]) Any other construction of
25 CEQA would contravene the purposes of the statute, since presumably every project that reaches
26 the stage of preparation of a CEQA document complies with the other laws and regulations
27 applicable to it. CEQA is intended to be an analysis that goes beyond rote compliance with other
28

1 laws whose scope may be narrow and single-purpose, an analysis to catch and disclose what other
2 laws may overlook.

3 Federal law did not require a conformity finding for the one major pollutant type that goes
4 up, not down, under the RTP/SCS: particulates. (FEIR at 4.3-29, Table 4.3-5; AR 2237.)

5 Emissions of coarse particulates, PM₁₀, are projected to increase by two tons per year, nearly
6 45%, and emissions of fine particulates, PM_{2.5}, are projected to increase by about one and one-
7 third tons, or about 40%, between 2010 and 2050. (*Id.*) SANDAG argues that, because the San
8 Diego Air Basin “is a federal attainment area for PM₁₀ and PM_{2.5}, no analysis of local PM₁₀ and
9 PM_{2.5} impacts are required for federal conformity.” (FEIR at 4.3-7; AR 2215.) The FEIR then
10 terminates the discussion and does no basin-wide analysis of the effects of the particulate matter
11 emissions increases.

12 However, just because no conformity analysis is required under federal law does not mean
13 that no analysis of the impact of the RTP/SCS on concentrations in the air of PM₁₀ and PM_{2.5} is
14 required *under* CEQA. It is clear that the San Diego Air Basin has a problem with particulate
15 matter: the area exceeded the federal standard on two days in 2010 (FEIR, at 4.3-4; AR 2212),
16 and it exceeded the state standard on 22 days. (*Id.*) SANDAG focused on the paperwork (no
17 conformity determination required) and failed to look at the actual air quality (exceedance of state
18 standard, very marginal compliance with federal standard) and the potential health impacts in
19 deciding how to treat this health-damaging air contaminant. The San Diego Air Basin is already
20 polluted enough to violate state standards on many days, and federal standards on some days, in
21 the baseline year, and the RTP/SCS will add to that pollution. Given that the RTP/SCS would
22 make already polluted and unhealthy air worse, SANDAG was obligated under CEQA to perform
23 an analysis to find out how much worse the RTP/SCS would make the air. One of the purposes
24 of an environmental impact report is to “demonstrate to an apprehensive citizenry that the agency
25 has, in fact, analyzed and considered the ecological implications of its actions.” (*No Oil, Inc. v.*
26 *City of Los Angeles* (1974) 13 Cal.3d 68, 86.) The FEIR here has not performed that function.

27 SANDAG failed to analyze or disclose the impact of the additional particulate pollution
28 that the RTP/SCS will cause on continued attainment of the federal PM₁₀ and PM_{2.5} standards in

1 the San Diego Air Basin, and on the existing risk of cancer in the basin. Because the potential
2 impact is such a serious one, depriving the public of full information concerning that impact and
3 the opportunity to comment meaningfully on it was an abuse of discretion. (*Save Our Peninsula*
4 *Comm. v. Monterey County Bd. of Supervisors* (2001) 87 Cal.App.4th 99, 118.) On this basis,
5 SANDAG's certification of the FEIR and approval of the RTP/SCS should be reversed.

6 **B. The FEIR Does Not Adequately Analyze or Disclose the Effects of the**
7 **RTP/SCS's Particulate Emissions on the State's More Stringent and**
8 **Health-Protective Air Quality Standards or How and to What Extent Such**
9 **Emissions Will Impact Public Health**

10 An environmental impact report should discuss whether a project will violate any air
11 quality standards or contribute substantially to existing or projected air quality violations. (*Kings*
12 *County Farm Bureau, supra*, 221 Cal.App.3d at 717-19 [state and federal air quality standards
13 relevant to determination as to existence of significant effect for CEQA purposes].) California
14 has always been a leader in clean air, and its own air quality standards for particulate matter are
15 more stringent than the federal standards. (FEIR at 4.3- 3, Table 4.3-1; AR 2211.) Even if the
16 FEIR had demonstrated that the increase in particulate emissions from the RTP/SCS would not
17 cause the federal particulate standards to be exceeded, that does not show what effect the
18 RTP/SCS will have on the stricter *California* standards. The FEIR does not show that an
19 adequate analysis, including appropriate air quality modeling, was done to determine the effect of
20 the RTP/SCS on the ability of the San Diego Air Basin to meet the California particulate
21 standards. This violated CEQA's procedural requirements of full environmental analysis and
22 disclosure.

23 As discussed above, because the San Diego Air Basin currently meets federal standards
24 for particulate matter,⁹ federal law did not require a conformity analysis from SANDAG for the
25 federal particulate standards. SANDAG did calculate the increases in regional particulate matter
26 emissions associated with the RTP/SCS over time, and those increases are summarized in the

27 ⁹ This is called being in "attainment." The two days in 2010 that the basin exceeded the
28 federal standard for PM₁₀ were not enough to place the basin into nonattainment with the federal
standard.

1 FEIR at 4.3-29, Table 4.3-5. (AR 2237.) The table shows that annual PM₁₀ emissions will
2 increase in 2020, 2035, and 2050 over the 2010 baseline, with 2050 emissions being nearly 45%
3 higher than 2010 emissions. Similarly, the table shows that annual PM_{2.5} emissions will increase
4 in 2020, and 2035, and while they will decrease somewhat in 2050 over previous years, these
5 emissions will still be about 40% higher in 2050 than in the 2010 baseline year. Rather than
6 taking the next step, however, and calculating the effects on air quality, or on any state or local air
7 plan to bring the basin into attainment with the state particulate matter standards, or on public
8 health, that will or might result from the increase, the FEIR simply bypasses the entire process by
9 summarily finding the increase to be significant. (*Id.*) There is no further supporting analysis
10 except a series of generalized statements that construction and traffic caused by growth and
11 development may increase particulate emissions in the various benchmark years. (FEIR at 4.3-
12 22, 30, 34, 38; AR 2230, 2238, 2242, 2246.) In short, the FEIR finds the increase in particulate
13 matter emissions to be significant without explaining in any detail how, where, and why it will be
14 significant.

15 Such a lack of specific analysis violates CEQA's mandate that an agency must analyze
16 and disclose all that it reasonably can about the potentially significant impacts of its actions. As
17 *Berkeley Keep Jets Over the Bay v. Board of Port Commissioners* (2001) 91 Cal.App.4th 1344,
18 1371, holds with regard to an increase in toxic air pollutant emissions similar to the ones at issue
19 here:

20 Before one brings about a potentially significant and irreversible change to the
21 environment, an EIR must be prepared that sufficiently explores the significant environmental
22 effects created by the project. The EIR's approach of simply labeling the effect "significant"
23 without accompanying analysis of the project's impact on the health of the [affected persons] is
24 inadequate to meet the environmental assessment requirements of CEQA.

25 SANDAG has committed the same CEQA violation here. Correlating pollution increases
26 with the health damage that may flow from them is required under CEQA. (*Bakersfield Citizens*
27 *for Local Control v. City of Bakersfield* (2004) 124 Cal.App.4th 1184, 1219-1220.) Since the San
28 Diego Air Basin already routinely exceeds the state PM₁₀ standard, presumably any increase in

1 particulate matter emissions will increase the already significant risk to health from the air in this
2 polluted basin.

3 Perhaps the most alarming failure occurred when SANDAG did not analyze or disclose
4 the impact of the increase in particulate matter emissions on the existing cancer risk in the San
5 Diego area. As stated above, in 2000, the Air Resources Board calculated the risk of developing
6 cancer in this basin due to exposure to diesel particulate emissions as 720 excess cases of cancer
7 per million people exposed. (FEIR at 4.3-10; AR 2218.) If any air pollution impact can be
8 considered potentially significant and subject to CEQA's requirement of full analysis and
9 disclosure, surely a potential increase to the existing cancer risk must be. The FEIR reports the
10 Air Resources Board's estimate and quibbles with it, (*id.*), but never disproves the calculation,
11 and – most significantly – never performs its own cancer risk calculation, either for the current
12 baseline, or for future years with the added diesel particulate emissions that the RTP/SCS will
13 cause. Nor does the FEIR present evidence that such a calculation is infeasible. If the Air
14 Resources Board could perform it over a decade ago, surely SANDAG could have performed it as
15 well, both as to a baseline year later than 2000, and over the life of the RTP/SCS. The Attorney
16 General's comment letter highlighted the Air Resources Board's diesel particulate cancer risk
17 calculation, and asked SANDAG to perform a similar analysis for the RTP/SCS. (FEIR App. G
18 at G-662; AR 4424.) SANDAG's failure to do so deprived the public of significant – possibly
19 vital – information, and thereby deprived it of the opportunity to comment meaningfully on the
20 FEIR and the project. This was also an abuse of discretion that warrants reversal of SANDAG's
21 certification of the FEIR and approval of the project.

22 **C. The FEIR Fails to Fully Analyze and Disclose Potential Harm to**
23 **Populations that it Recognizes Are Sensitive Receptors to Air Pollution.**

24 CEQA requires that the environmental impacts of a project be evaluated in context.
25 (Guidelines § 15064, subd. (b) [the significance of an activity may vary with the setting].) The
26 context of an action or a specific impact may include the sensitivity of the environment, or of the
27 persons, affected; some affected persons may be more vulnerable than the general population
28 (such as children, the elderly, or persons whose health already is compromised). In addition,

1 some of those affected may already be subject to heavier environmental burdens and thus more
2 sensitive to even small incremental increases in that burden. (See, e.g., *Los Angeles Unified*
3 *School Dist. v. City of Los Angeles* (1997) 58 Cal.App.4th 1019, 1025 [noise already present at a
4 school might affect the determination of what amount of additional noise should be considered
5 significant].) In addition, some environments may have already experienced so much pollution
6 from past and present projects that additional pollution may produce a cumulative effect that is so
7 much greater than the contribution from the individual project being considered as to be
8 “startling.” (*Neighbors for Smart Rail v. Exposition Metro Construction Authority* (2012) 205
9 Cal.App.4th 552, 577.) For this reason, CEQA requires a cumulative impacts analysis to
10 determine whether the incremental effects of an individual project are significant when viewed in
11 connection with the effects of past projects, the effects of other current projects, and the effects of
12 probable future projects. (Guidelines, § 15065, subd. (a)(3); see also *id.*, § 15130.)

13 The FEIR recognizes that certain communities within the San Diego Air Basin are
14 “sensitive receptors”¹⁰ for increases in carcinogenic air pollution, (FEIR App. G at G-661; AR
15 4423), based in part on the fact that various studies in California and elsewhere have shown that
16 such communities “may be exposed [to] unhealthful air more frequently and at higher levels than
17 other groups.” (*Id.*)¹¹ The FEIR performs what it describes as a “localized air quality index
18 analysis” for some areas containing these sensitive receptors; the analysis focuses on certain
19 communities already identified in the FEIR as low income or minority communities.¹² (FEIR at
20 4.3-47-56; AR 2255-2264.) The maps in Figures 4.3-2, 4.3-3, 4.3-4, and 4.3-5 (FEIR 4.3-48,
21 4.3-49, 4.3-52, and 4.3-55; AR 2256, 2257, 2260, and 2263) show that many of these

22 ¹⁰ The term “sensitive receptor” has long been used in Appendix G of the Guidelines, with
23 exposure of sensitive receptors to air pollution being specified as one factor that should be used in
determining whether a given project will have a significant effect on the environment.

24 ¹¹ The FEIR also includes the generally applicable information that children chronically
25 exposed to vehicle emissions showed decreased lung function that are likely permanent, and notes
that children in neighborhoods exposed to high levels of “traffic pollutants” show increases in
bronchitis and asthma; common sense dictates that such children are also sensitive receptors.
(FEIR at 4.3-11; AR 2219.)

26 ¹² The Attorney General, in her comments on the Draft EIR, advised SANDAG of its duty
27 to analyze the impacts of the RTP/SCS on already-burdened communities, including but not
28 limited to minority and low-income communities that may already be at or near their capacity to
bear any additional pollution burden. (FEIR App.G at G-660-61; AR 4422-23.)

1 communities are adjacent to freeways and highway, and therefore are likely to be exposed
2 regularly to particulate emissions from traffic. (See FEIR at 4.3-44-55; AR 2252-53, discussing
3 proximity to freeways and its correlation with exposure to particulate matter.) While perhaps
4 well intentioned, this localized analysis fails to assess adequately the impacts of increased
5 pollutant emissions on the sensitive receptors it has selected for the analysis. As described below,
6 the FEIR does not provide information on the levels of pollution to which these sensitive
7 communities are now exposed, does not disclose the increased levels of pollution to which the
8 RTP/SCS can be expected to expose the communities during the life of the project, and does not
9 disclose the effects on the health of the sensitive receptors that can be expected from the
10 increased levels of exposure.

11 **1. Sensitive receptors will experience an increased and increasing**
12 **potential for exposure to elevated levels of diesel particulate**
13 **emissions.**

14 Although failing to analyze the effects on the air basin as a whole of the increased
15 particulate emissions that the RTP/SCS will cause, the FEIR did purport to perform what it styled
16 as a “qualitative” analysis to identify the areas where exposure to “localized concentrations of
17 vehicle emissions, especially from diesel truck traffic, containing particulate matter (diesel PM),
18 and from high volume or congested roadways” will increase during the life of the RTP/SCS.
19 (FEIR at 4.3-44; AR 2252.) The FEIR used what it called an “air quality index,” a technique
20 apparently suggested by federal guidance. (FEIR at 4.3-44-45, 47-50; AR 2252-53, 2255-2258.)
21 The FEIR estimates that nearly 22 percent of the freeway segments analyzed will have the
22 potential for high levels of exposure to carcinogenic diesel exhaust emissions in 2010, but this
23 already substantial number rises annually, reaching *54 percent* of the segments studied in 2050.
24 Regional scale maps show the freeway segments that were analyzed and whether each segment
25 was rated low, moderate, or high. The maps also show, indicated by cross-hatching, where the
26
27
28

1 sensitive receptor communities that the FEIR chose to study are located. (FEIR, Figs. 4.3-2, 4.3-
2 3, 4.3-4, and 4.3-5, at FEIR 4.3-48, 4.3-49, 4.3-52, and 4.3-55; AR 2256, 2257, 2260, and 2263.)

3
4 **2. The FEIR does not make the legally required connection between**
5 **elevated risk of exposure to diesel particulates and health impacts on**
6 **sensitive receptors.**

7 Despite the Air Quality Index's clear demonstration that exposure to diesel particulates is
8 expected to be "high" in the vicinity of 22 to 54 percent of the freeway segments in the RTP/SCS,
9 the FEIR performs no analysis, not even a rough one, of the effects on the health of the
10 communities adjoining these segments that this rise in exposure can be expected to cause. Under
11 the rule of *Bakersfield*, cited above, an environmental impact report must make the connection
12 between increases in air pollution and the harm to public health that those increases may cause.
13 (*Bakersfield Citizens for Local Control*, *supra*, 124 Cal.App.4th at 1219-1220.) Even though the
14 FEIR's localized analysis is purportedly being done to identify the effects of the RTP/SCS on
15 sensitive receptors identified by the FEIR, the document does not analyze whether and how the
16 sensitive receptors it has chosen to study may suffer adverse health effects, given their particular
17 exposures.

18 The FEIR fails to calculate the number of sensitive receptors that will suffer increased
19 potential for exposure, presents no data to show the current exposure levels of the sensitive
20 receptor communities it identifies, and does not project the expected exposure levels that the
21 sensitive receptor communities would suffer due to the RTP/SCS. The Guidelines provide in
22 Section 15144 that an agency must "use its best efforts to find out and disclose all it reasonably
23 can." SANDAG disclaims any ability to determine health risks to specific communities from
24 specific RTP/SCS projects, saying that this can only be done through project-level analyses and
25 health risk assessments. (FEIR at 4.3-46-47; AR 2254-55.) Yet, the FEIR has shown that
26 SANDAG knows now which freeway segments are currently rated high for particulate exposure
27 potential, that SANDAG knows which segments' potential for exposure will go up in 2020, 2035,
28 and 2050, and that SANDAG knows which of these segments do or will run through the
communities that the FEIR has identified as sensitive receptors. The FEIR shows that air quality

1 monitoring has been done in at least some of these areas. (FEIR at 4.3-5, Fig. 4.3-1; AR 2213
2 [showing locations of air quality monitors operated by San Diego Air Pollution Control District].)
3 Finally, the FEIR discusses the availability of computer models that can project both regional and
4 localized emissions. (FEIR at 4.3-29 and 65; AR 2237, 2273.)

5 Yet, despite possessing this array of knowledge, and despite recognizing the serious
6 nature of exposure to diesel particulate emissions, the FEIR contains not a single modeling run or
7 health risk assessment for communities along those freeway segments that it predicts will have
8 high exposure potential and that it has acknowledged are sensitive receptor communities. Not a
9 single representative or sample analysis appears in the FEIR. Nor has SANDAG presented
10 substantial evidence that such an analysis, on a representative or sample basis at least, is
11 infeasible. Guidelines section 15444 and the *Bakersfield* case place a duty on SANDAG to learn
12 as much as it feasibly can about the impacts of the RTP/SCS, and to correlate the emissions
13 increases that the project will cause with likely health effects. Such full environmental disclosure
14 is one of the core purposes of CEQA. (Guidelines, § 15002, subd. (a).)

15 **3. The seriousness of the potential health effects, especially for**
16 **sensitive receptors, required SANDAG to discover and disclose more**
17 **information; the failure is prejudicial.**

18 As stated, the health effects from exposure to diesel particulates may be serious. The San
19 Diego Air Basin already had a serious cancer risk from diesel particulate in 2000, when there
20 were over a decade's fewer diesel vehicles in the basin than there are now. (FEIR at 4.3-10; AR
21 2218.) As *Berkeley Keep Jets Over the Bay v. Port of Oakland* (2001) 91 Cal.App.4th 1344,
22 1382 states, "[t]he Guidelines provide that the level of detail required in addressing particular
23 impacts should be 'in proportion to their severity and probability of occurrence.' (Guidelines, §
24 15143.)" Given the seriousness of the existing cancer risk in the San Diego area from diesel
25 particulate pollution, given the high number of freeway segments that may increase exposure to
26 such pollution, and given the FEIR's recognition that some communities are sensitive receptors
27 for this type of air pollution, SANDAG has violated CEQA's duty of full environmental
28 disclosure by failing to perform a full analysis of the increased health burden that sensitive

1 receptor communities, as well as the public throughout the air basin, may suffer, or to present
2 substantial evidence that such an analysis is not feasible.

3 Further, the omission of information as to the potential health impacts on sensitive
4 receptor communities is prejudicial, depriving both the SANDAG Board and the public of
5 information that they needed to be able to make an informed judgment as to the benefits and
6 harms that would result from the RTP/SCS. The California Supreme Court has held that failure
7 to comply with CEQA's informational mandate is prejudicial where it results in a subversion of
8 the purposes of CEQA by omitting needed information from the environmental review process.
9 (*Environmental Protection Information Center (EPIC) v. California Dept. of Forestry & Fire*
10 *Protection* (2008) 44 Cal.4th 459, 486.) The Supreme Court explained in *EPIC* that this "rule
11 emerges out of the difficulty courts have in assessing the effects of the omitted information, much
12 of it generally highly technical, on the ultimate decision." (*Id.*) This is certainly true here, where
13 the omitted information is so technical in nature that the public is almost certainly incapable of
14 knowing it unless the FEIR provides it. In *Cadiz Land Company, Inc. v. County of San*
15 *Bernardino* (2006) 83 Cal.App.4th 74, 92-93, the Court of Appeal held that the environmental
16 impact report's failure to include information on the possible contamination of groundwater
17 constituted a prejudicial abuse of discretion because "an informed decision cannot be made as to
18 whether it is worth taking the risk" of contaminating a valuable public resource. Similarly here,
19 the decisions makers and the public cannot make an informed choice as to whether it is
20 worthwhile to take the risk of harm to the health of sensitive receptors that the RTP/SCS in its
21 current form, without design changes or mitigation, may pose, unless they have a reasonable
22 prediction of what the likelihood of that harm is, and how serious the harm is likely to be. The
23 FEIR's failure to provide this information is prejudicial, and requires reversal of SANDAG's
24 decision to certify the FEIR and approve the project.

25 **D. The FEIR Violates CEQA's Mandate that Agencies Not Approve Projects**
26 **with Significant Environmental Impacts without Proposing and Adopting**
All Feasible Mitigation

27 The FEIR's failures as an informational document are multiple and serious. But the FEIR
28 also fails as a substantive document, in that it fails to propose all feasible mitigation measures for

1 the impacts on public health from the exposure to diesel particulate emissions that the RTP/SCS
2 will cause, as CEQA requires. (Pub. Resources Code, §§ 21002, 21081, subd. (a).) The FEIR
3 presents several measures that it asserts will reduce particulate exposure. However, the document
4 fails to inform the decision makers or the public that most of these measures are *already* required
5 by applicable state or local regulations. Because these measures are already required by law to be
6 in the project, SANDAG or a local agency cannot add them to the RTP/SCS, or to an individual
7 transportation project, as mitigation; they are, or should be, there already. These measures should
8 have been assumed to be part of the baseline, rather than discretionary measures that can be added
9 to the project in order to “reduc[e] or eliminat[e] the impact over time” of the RTP/SCS.
10 (Guidelines, § 15370, subd. (d).) Characterizing already required measures as mitigation
11 misleads the public and decision makers and avoids SANDAG’s obligation to consider other
12 mitigation that could reduce pollution, improve public health, and save lives.

13 Specifically, the FEIR lists as potential and feasible mitigation measures: (1) a program to
14 retrofit older, high-emitting vehicles; (2) anti-idling requirements or policies; (3) controlling
15 fugitive dust; (4) routing traffic away from populated zones; and (5) replacing older buses with
16 new, cleaner ones. (FEIR at 4.3-64; AR 2272.) However, four of these five so-called mitigation
17 measures are already required by law: (1) the Air Resources Board has adopted regulations
18 requiring replacement or retrofit of existing diesel trucks and buses (Cal. Code Regs, tit. 13, §
19 2701); (2) Air Resources Board regulations already forbid diesel truck idling beyond five
20 minutes, except in limited circumstances (Cal. Code Regs, tit. 13, § 2485); (3) the San Diego Air
21 Pollution Control District has extensive and detailed requirements for controlling fugitive dust
22 (APCD Rule 55); and (5) the Air Resources Board in 2000 adopted detailed regulations to require
23 either the replacement or retrofit of polluting transit and school buses, a program that will be
24 substantially complete by 2023, long before the conclusion of the RTP/SCS (Cal. Code Regs., tit.
25 13, § 2025). As to measure 4, routing traffic away from populated areas, the maps in Figures 4.3-
26 2, 4.3-3, 4.3-4, and 4.3-5 (FEIR 4.3-48, 4.3-49, 4.3-52, and 4.3-55; AR 2256, 2257, 2260, and
27 2263), show that many of the freeway segments with moderate or high potential to expose people
28

1 to diesel exhaust are an integral part of the RTP/SCS, and they clearly have been carefully
2 planned to go through populated areas, including the sensitive communities discussed above,
3 rather than to avoid them.

4 Nor was SANDAG ignorant that at least some of these measures are already required by
5 specific regulations, and should therefore be part of each appropriate project from the beginning,
6 rather than being available to be added to RTP/SCS and its component projects as mitigation.
7 The FEIR refers to Air Resources Board's diesel truck and bus replacement or retrofit programs
8 at page 4.3-47 (AR 2255), and to anti-fugitive dust requirements at page 4.3-18 (AR 2226). The
9 FEIR fails as a substantive document, since it fails to present and evaluate a range of mitigation
10 measures that SANDAG could legally adopt that are not already applicable. In some cases, the
11 regulations were adopted more than a decade ago. Further, by proposing what are chiefly existing
12 regulations as mitigation measures, the FEIR has failed to propose and adopt mitigation that is
13 feasible and is additional to existing regulations. Neither has it demonstrated that there is no
14 feasible mitigation. The mitigation discussion for diesel particulate emissions is essentially a
15 nullity. (FEIR at 4.3-62-64, 4.3-67-68; AR 2270-72, 2275-76.) The discussion also fails
16 CEQA's informational purpose: the decision makers and the public are as much in the dark as to
17 what SANDAG could feasibly do to mitigate the serious environmental harms that the RTP/SCS
18 will cause as they were before reading the FEIR.

19 Both the informational and the substantive failure are prejudicial under Public Resources
20 Code section 21005. The FEIR's failure to present information regarding feasible mitigation
21 measures that might really mitigate the RTP/SCS's environmental damage has deprived the
22 public of the opportunity to comment meaningfully on what mitigation is or is not feasible.
23 SANDAG's failure to adopt all feasible mitigation measures, rather than simply list what other
24 agencies already require, violates CEQA's mandate that agencies not approve projects that will
25 do significant environmental damage if mitigation is available and feasible. (Pub. Resources
26 Code, §§ 21002, 21081(a); *City of Marina v. Board of Trustees of the California State University*
27 (2006) 39 Cal.4th 341, 361-62.) Individually and together, these failures constitute an abuse of
28

SANDAG's discretion, and compel invalidation of SANDAG's certification of the FEIR and reversal of its approval of the RTP/SCS.

II. SANDAG HAS FAILED TO PROPERLY DISCLOSE AND MITIGATE THE SIGNIFICANT ADVERSE IMPACTS OF THE RTP/SCS ON GREENHOUSE GAS EMISSIONS AND GLOBAL WARMING

Greenhouse gas emissions and global warming are serious environmental impacts that must be addressed under CEQA. (See, e.g., Pub. Resources Code, § 21083.05; Guidelines, § 15064.4; *Communities for a Better Environment v. City of Richmond* (2010) 184 Cal.App.4th 70, 90-91.) To stabilize the climate and avoid the most serious adverse outcomes of climate change, we must substantially reduce our annual GHG emissions over the coming decades, achieving a low-carbon future by mid-century. According to the FEIR, however, the overall GHG emissions associated with the RTP/SCS will decrease only until the year 2020, with the emissions trajectory turning upward after 2020 and continuing to *increase* at least until 2050 (the planning horizon of the RTP/SCS). (FEIR at 4.8-26; AR 2578.) Under CEQA, SANDAG cannot adopt this plan without fully exploring and adopting all feasible mitigation for GHG emissions, which it has failed to do.

A. Greenhouse Gas Emissions Pose a Serious Problem

Before discussing the FEIR's infirm treatment of GHG emissions, it is important first to establish the relevant context. The climate is affected by the concentration of GHGs in the atmosphere. The concentration of carbon dioxide, the primary GHG, has increased from approximately 280 parts per million (ppm) in pre-industrial times to well over 380 ppm, according to the National Oceanic and Atmospheric Administration's (NOAA) Earth Systems Research Laboratory.¹³ Almost all of the increase is due to human activities, such as fossil fuel use.¹⁴ The current rate of increase in carbon dioxide concentrations is about 1.9 ppm/year; present carbon dioxide concentrations are higher than any time in at least the last 650,000 years.¹⁵ GHGs persist in the atmosphere for decades and in some cases millennia.¹⁶

¹³ See <http://www.epa.gov/climatechange/science/indicators/ghg/ghg-concentrations.html>. (Cited at AR 25640.)

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ Intergovernmental Panel on Climate Change, *Frequently Asked Questions*, FAQ 10.3 (2007), available at www.ipcc.ch/pdf/assessment-report/ar4/wg1/ar4-wg1-faqs.pdf. (Cited at AR (continued...))

1 The atmosphere and the oceans are reaching their capacity to absorb GHGs without
2 significantly (and perhaps abruptly) changing the Earth's climate. California is already seeing the
3 effects of climate change. As the Resources Agency observed in its 2009 report, we already are
4 experiencing sea level rise, coastal erosion, increased average temperatures, more extreme hot
5 days and increased heat waves, shifts in the water cycle, and increases in the frequency and
6 intensity of wildfires. (Resources Agency, *2009 Climate Adaptation Strategy* at p. 3.)¹⁷ These
7 effects are expected to increase with rising GHG levels in the atmosphere. Further, the burdens
8 of climate change will not be shared equally. Future climate scenarios are expected to
9 disproportionately affect, for example, the urban poor, the elderly and children, traditional
10 societies, agricultural workers and rural populations. (Office of Environmental Health Hazard
11 Assessment, *Indicators of Climate Change in California: Environmental Justice Impacts* (Dec.
12 2010) at p. 2.)¹⁸

13 Science establishes that in order to stabilize the climate and avoid the most catastrophic
14 outcomes of climate change, we must substantially reduce our annual GHG emissions over time,
15 achieving a low-carbon future by mid-century. (See ARB Scoping Plan at 4; AR 27864.)

16 **B. The State Has Established Clear Objectives to Address Increases in**
17 **Greenhouse Gas Emissions**

18 California has memorialized these scientifically supported GHG reduction objectives in
19 law. In 2005, Governor Schwarzenegger issued Executive Order S-3-05 to establish target dates
20 for the progressive reduction of GHG emissions in California. The order called for: (1) by 2010,
21 a reduction of GHG emissions to 2000 levels; (2) by 2020, a reduction of GHG emissions to 1990
22 levels; and (3) by 2050, a reduction of GHG emissions to 80 percent below the 1990 emissions
23 levels. (AR 27049-27050.) Following up on the Governor's order, in the California Global
24 Warming Solutions Act of 2006 (generally known as "AB 32"),¹⁹ the Legislature declared that

25 (...continued)
26 25640.)

¹⁷ Available at <http://www.climatechange.ca.gov/adaptation/>. (Cited at AR 25640.)

27 ¹⁸ Available at <http://oehha.ca.gov/multimedia/epic/epic123110.html>. (Cited at AR
28 25640.)

¹⁹ Health and Saf. Code, § 38500 et seq.

1 global warming caused by GHG emissions from multiple sources, including but not limited to
2 automobiles, trucks, buses and trains,

3 poses a serious threat to the economic well-being, public health, natural resources,
4 and the environment of California. The potential adverse impacts of global warming
5 include the exacerbation of air quality problems . . . and an increase in the incidences
6 of infectious diseases, asthma, and other human health-related problems.

6 (Health & Saf. Code, § 38501, subd. (a).)

7 Under AB 32, by 2020, California must take the first step toward climate stabilization by
8 reducing its total statewide greenhouse gas emissions to 1990 levels. (Health & Saf. Code, §
9 38550). To achieve AB 32’s 2020 limit, total statewide greenhouse gas emissions must be
10 reduced by approximately 15 percent from 2008 levels. Pursuant to AB 32, ARB, as the lead
11 state agency for implementing AB 32, adopted a Climate Change Scoping Plan (Scoping Plan) in
12 December 2008, to act as a “roadmap” of strategies to achieve the GHG reduction limit set forth
13 in AB 32. The Scoping Plan must be updated at least once every five years to “achieve the
14 maximum technologically feasible and cost-effective reductions of greenhouse gas emissions.”
15 (Health & Saf. Code, § 38561, subds. (a), (h); AR 27842 – 27993.)

16 AB 32, through the implementation and periodic refinement of the Scoping Plan,
17 implements Executive Order S-03-05 (2005), which set the statewide 2020 target as an interim
18 step to reducing statewide emission levels, by 2050, to 80 percent below 1990 levels. According
19 to ARB, “[t]he 2020 goal was established to be an aggressive, but achievable, mid-term target,
20 and the 2050 greenhouse gas emissions reduction goal represents the level scientists believe is
21 necessary to reach levels that will stabilize climate.” (Scoping Plan at 4; AR 27864.)²⁰

22 The emissions reductions required to reach our statewide climate objective are substantial.
23 In the longer term, we must reduce our total GHG emissions by approximately four percent per
24 year between 2020 and 2030, and our per capita emissions by slightly less than five percent per
25 year during the 2020 to 2030 period, with continued reductions required through mid-century.
26 These required reductions are graphically illustrated in the Scoping Plan at Figure 6. (Scoping

27
28 ²⁰ The Scoping Plan was readopted by ARB on August 24, 2011.

1 Plan at 118, Fig. 6; AR 27978.) ARB contemplates that the steps necessary to move toward the
2 targets of Executive Order S-3-05 include implementing “sound land use and transportation
3 policies to lower VMT and shift travel modes.” (Scoping Plan at 119; AR 27979.)

4 SB 375, enacted in September 2008, was intended to support and complement AB 32. It
5 requires Metropolitan Planning Organizations, including SANDAG, to incorporate a Sustainable
6 Communities Strategy (SCS) in their regional transportation plans that demonstrates how the
7 region would achieve GHG emissions reductions targets established by ARB for the automobile
8 and light duty truck sector. (Gov. Code, § 65080, subd. (b)(2); AR 2080.) In enacting SB 375,
9 the Legislature noted that the transportation sector “contributes over 40 percent of the greenhouse
10 gas emissions” in our State and “is the single largest contributor of greenhouse gases of any
11 sector.” (Stats. 2008, ch. 728, §1(a), p. 4064.) The Legislature also made a finding that
12 “[w]ithout improved land use and transportation policy, California will not be able to achieve the
13 goals of AB 32.” (*Id.*, §1(c), p. 4065.) As required by statute, ARB has set SB 375 targets for the
14 SANDAG region for 2020 and 2035.

15 The GHG reduction objectives set forth in state law thus may be useful benchmarks in
16 determining whether a given project will help the State to do its part toward climate stabilization
17 (and thus not result in significant GHG-related impacts), or instead will obstruct this
18 environmental goal (resulting in GHG emissions that are cumulatively considerable).

19 **C. The RTP/SCS Is Inconsistent with the State’s GHG Reduction Objectives**
20 **and its Impacts Are Therefore Significant under CEQA**

21 The FEIR section dealing with emissions of GHGs and their impact on global warming and
22 climate change shows that the overall amount of driving in the San Diego region, expressed as
23 Vehicle Miles Traveled (VMT), will increase by about half over the life of the RTP/SCS,
24 increasing by 10.5 percent over 2010 levels by 2020, by 32.3 percent by 2035, and by 51.1
25 percent by 2050. (FEIR at 4.12-16, 4.12-21 and 4.12-24; AR 2794, 2799 and 2802, respectively.)
26 In addition, while the overall GHG emissions associated with the RTP/SCS will decrease until the
27 year 2020, they will increase after 2020 and will continue to increase at least until 2050, which is
28 the planning horizon of the RTP/SCS. (FEIR at 4.8-26; AR 2578.) As noted above, SB 375

1 requires regional transportation agencies such as SANDAG to prepare and adopt an SCS as a
2 means of reducing VMT and the resulting emissions of greenhouse gases. (Gov. Code, § 6050,
3 subd. (b)(2).) While the FEIR states that the RTP/SCS will meet the greenhouse gas reduction
4 targets set by the ARB pursuant to SB 375 for SANDAG for 2020 and 2035, the trajectory of per
5 capita GHG emissions from cars and light trucks moves upward from 2020 to 2035, suggesting
6 that the early reductions are not sustainable over the longer term. The FEIR shows that
7 SANDAG will just meet its SB 375 greenhouse gas emissions reductions target for 2035, and that
8 greenhouse gas emissions will then continue to increase to 2050, with emissions in 2050
9 exceeding the 2010 baseline emissions levels (FEIR at 4.8-26; AR 2578), a result that is
10 inconsistent with the State’s objective to avoid dangerous climate change.

11 SANDAG must fully address this inconsistency. SANDAG admits that “[a] GHG impact
12 would be considered [to be significant under CEQA] if it conflicted with applicable GHG
13 reduction plans, policies, or regulations.” (FEIR, p. 4.8-29; AR 2581.) But, according to
14 SANDAG, the Executive Order S-3005 “does not constitute a ‘plan’ for GHG reduction, and no
15 state plan has been adopted to achieve the 2050 goal.” (FEIR, 4.8-29-30; AR 2581-82.) The
16 FEIR therefore does not find the RTP/SCS’s failure to consider and respond to the Executive
17 Order S-3-05’s objective of a sharply downward trend in GHG emissions in the 40 year period
18 between 2010 and 2050 to be a significant impact. (FEIR, 4.8-29-36; AR 2581-88.)

19 This position lacks merit. First, it fails to recognize that Executive Order S-3-05 is an
20 official policy of the State of California, which was established by a gubernatorial order in 2005,
21 was assigned great importance by ARB in the Scoping Plan for AB 32, arises from climate
22 science, and advances the overarching environmental objective that is relevant under CEQA:
23 climate stabilization. When a lead agency examines whether a project may have a significant
24 effect on the environment, it must base its determination “to the extent possible on scientific and
25 factual data.” (Guidelines, § 16064, subd. (b).) Second, SANDAG cannot ignore the fact that
26 Executive Order S-3-05 and the Scoping Plan of AB 32 are driven by the recognition of climate
27 scientists that “the 2050 target represents the level of greenhouse gas emissions that advanced
28

1 economies must reach if the climate is to be stabilized in the latter half of the 21st century.”
2 (Scoping Plan at 117; AR 27977.)

3 According to CEQA, an EIR must provide public agencies and the public in general with
4 detailed information about the effect a proposed project is likely to have on the environment.
5 (Pub. Resources Code, § 21061.) An EIR should serve as an “environmental alarm bell” to alert
6 public officials and the public “to environmental changes before they have reached ecological
7 points of not return.” (*County of Inyo v. Yorty* (1973) 32 Cal.App.3d 795, 810; *Santiago Water*
8 *District v. County of Orange* (1981) 118 Cal.App.3d 818, 822; *Laurel Heights Improvement Assn.*
9 *v. Regents of the University of Calif.* (1988) 47 Cal. 3d 376, 392.) In this case, given the
10 extensive GHG emissions SANDAG has determined will be generated from carrying out the
11 RTP/SCS and their growth over time, as measured against Executive Order S-3-05, AB 32 and its
12 Scoping Plan, with their requirements for significant GHG reductions over time, an adequate EIR
13 would make these facts very clear. SANDAG’s choice to focus only on short-term
14 improvements, ignoring that the region is poised to create a significant upward GHG emissions
15 curve in the longer term, is an abuse of discretion under CEQA.

16 **D. SANDAG Has Failed to Adopt All of the Feasible Mitigation Measures**
17 **Available to It as the Lead Agency Preparing a Programmatic FEIR for**
18 **Such a Large-Scale and Long-Term Project as the RTP/SCS**

19 SANDAG’s failure to consider increasing GHG emissions over the longer term, as
20 discussed above, has resulted in an incomplete response to the duty under CEQA to
21 mitigate the significant GHG impacts that will occur. This failure is serious and warrants
22 the relief sought in this case. As noted, “[p]ublic agencies should not approve projects as
23 proposed if there are feasible alternatives or feasible mitigation measures available which
24 would substantially lessen the significant environmental effects of such projects” (Pub.
25 Resources Code, § 21002.)
26
27
28

1 **1. SANDAG has the ability to adopt alternatives and impose**
2 **mitigation.**

3 SANDAG controls key funding²¹ and is also a key strategist and decisionmaker with
4 respect to the financing of the transportation projects selected for inclusion in the RTP/SCS.
5 SANDAG has identified itself, along with local agencies, as being responsible for “maximizing
6 opportunities to leverage sales tax revenues to attract additional state and federal funds to the
7 region for transportation and related infrastructure improvements.” (RTP/SCS at 5-15; AR
8 13251.) SANDAG is very much in control of the expenditure of the \$25.2 billion of TransNet
9 funds projected to be available between the present and 2050. The TransNet Ordinance specifies
10 that SANDAG, in its capacity as the San Diego County Regional Transportation Commission,
11 must use TransNet funds “to improve transportation facilities and services countywide.”
12 (TransNet Ordinance, § 4; AR 28697.) “[A]ll projects so funded must be consistent with the
13 Regional Transportation Plan (RTP).” (TransNet Ordinance, § 5; AR 28700.)

14 In light of SANDAG’s central role in approving and administering the RTP/SCS, it is
15 abundantly clear that the RTP/SCS is much more than a lengthy planning and policy document
16 sitting on a shelf, waiting for other agencies to implement it as they see fit. With the authority to
17 direct the expenditure of the dedicated revenue stream generated by TransNet during the next
18 several decades, and to coordinate the spending of a combined total of over \$218 billion in
19 federal, state and local funds, SANDAG is extremely well-situated to mitigate the substantial
20 GHG emissions associated from the build- out of the countywide transportation system approved
21 in the RTP/SCS or to take action resulting in design changes to the plan that would still serve the
22 region’s transportation needs, but would reduce environmental impacts. But SANDAG, to a large
23 extent, attempted to avoid its legal obligation to comply with CEQA’s requirement of considering
24 and adopting feasible mitigation at the time it approved the RTP/SCS, by deferring or delegating
25 most of the responsibility for mitigation of GHG emissions to other local agencies, to be taken
26 care of later, as discussed below. (See FEIR at 4.8-36-38; AR 2588-90.) This failure warrants
27 the setting aside of SANDAG’s decision.

28 ²¹ See RTP/SCS at 5-2 and 5-11 (AR 13237 and 13246.).

1 **2. SANDAG cannot avoid or defer its CEQA obligations simply**
2 **because the FEIR is a programmatic document.**

3 The FEIR at issue is a “Program Environmental Impact Report” or “program EIR” for the
4 RTP/SCS, which is intended to serve as the blueprint for the construction of transportation
5 projects in the San Diego region for approximately the next 40 years. (FEIR at ES-1; AR 1997.)
6 The CEQA Guidelines recognize that a programmatic environmental impact report for a series of
7 related actions allows “the lead agency to consider broad policy alternatives and program wide
8 mitigation measures at an early time when the agency has greater flexibility to deal with basic
9 problems or cumulative impacts.” (Guidelines, § 15168, subd. (b)(4).)

10 SANDAG may argue that the programmatic nature of the EIR justifies its failure to further
11 examine mitigation and alternatives that would reduce GHG impacts. In 2008, the California
12 Supreme Court provided relevant direction on the use of programmatic EIRs in the case of *Save*
13 *Tara v. City of West Hollywood* (2008) 45 Cal. 4th 116. As the Court explained, in “complex or
14 phased projects” a programmatic document may postpone evaluation of project details to a later
15 phase, but only where those details “are not reasonably foreseeable when the agency first
16 approves the project.” (*Id.* at 139.) Here, by contrast, SANDAG’s FEIR foresees a significant
17 upward trajectory of total GHG emissions that will result after 2020, and it reflects SANDAG’s
18 understanding that these impacts result from its planning actions. Therefore, it is improper to
19 defer most of the GHG emissions-related mitigation to other public agencies at a later date, long
20 after the massive project has been set in motion. These known, foreseeable impacts must be
21 addressed now.

22 **3. SANDAG has failed to fully analyze and impose feasible mitigation**
23 **for GHG impacts.**

24 The FEIR relies largely on the promise of future mitigation that may never materialize.
25 “Numerous cases illustrate that reliance on tentative plans for future mitigation after completion
26 of the CEQA process significantly undermines CEQA’s goals of full disclosure and informed
27 decisionmaking; and consequently these mitigation plans have been overturned on judicial review
28 as constituting improper deferral of environmental assessment.” (*Communities for a Better*

1 *Environment v. City of Richmond* (2010) 184 Cal.App.4th 70, 92-93, citing, e.g., *Quail Botanical*
2 *Gardens Foundation, Inc. v. City of Encinitas* (1994) 29 Cal.App.4th 1597, 1605, fn. 4 [city is
3 prohibited from relying on “postapproval mitigation measures adopted during the subsequent
4 design review process”].)

5 In Mitigation Measure GHG-A, for the 2035 and 2050 time frames, SANDAG promises to
6 update future Regional Comprehensive Plans and Regional Transportation Plans/Sustainable
7 Community Plans “to incorporate policies and measures that lead to reduced GHG emissions.”
8 (FEIR at 4.8-36; AR 2588.) Indicating an intention to incorporate largely unspecified GHG-
9 reducing policies and measures at unspecified times is not adequate mitigation. SANDAG has
10 identified the GHG emissions problem at this time; the problem is reasonably foreseeable, so
11 SANDAG must adopt all of the feasible mitigation it is capable of at this time.

12 Mitigation Measure GHG-B derives from a determination by SANDAG that increases in
13 GHG emissions over 2010 levels will exist in 2035 and 2050 in the San Diego County region.
14 SANDAG has suggested in a general fashion some useful mitigation actions related to increases
15 in these projected GHG emissions, but it also has attempted to defer much of the implementation
16 of these actions to other agencies, at a later time, by means of a “SANDAG shall and local
17 agencies can and should” format for the adoption of mitigation measures. (FEIR at 4.8-36-38;
18 AR 2588-90.) Measure GHG-B urges the local governments in San Diego County to adopt and
19 implement Climate Action Plans, or Plans for the Reduction of Greenhouse Gas Emissions as
20 described in section 15183.5 of the CEQA Guidelines (Guidelines, § 15183.5). Of the 18 cities
21 and the County of San Diego to which the RTP/SCS applies, only four cities and the County have
22 created or are preparing Climate Action Plans. (FEIR at 4.8-14; AR 2566.) SANDAG could take
23 definitive steps now to help mitigate these projected emissions. The creation and implementation
24 of Climate Action Plans in all local jurisdictions within the San Diego region should not be
25 deferred, given SANDAG’s finding that its approval of the current RTP/SCS will in fact lead to
26 significant increases in GHG emissions in 2035 and 2050. With the current FEIR, SANDAG has
27 abused its discretion and not proceeded in the manner required by CEQA, which is to adopt
28

feasible mitigation measures that would substantially lessen the identified significant environmental effects. (Pub. Resources Code, § 21002.)

CONCLUSION

The RTP/SCS will guide the growth and development of the San Diego region, and influence the quality of life of its people, through the middle of this century. Before SANDAG adopted this plan and committed this region to its far-reaching consequences, it had a clear duty to comply with CEQA. “Because the EIR must be certified or rejected by public officials, it is a document of accountability.” (*Laurel Heights, supra*, 47 Cal.3d at 392.) The FEIR fails to provide the information that SANDAG needed to be able to make the weighty decision to adopt the RTP/SCS in its current form, and that the residents of San Diego needed to hold their public officials accountable for the environmental and public health impacts of that decision, and it fails to consider and adopt all feasible mitigation. The People ask this Court to hold SANDAG accountable, to invalidate SANDAG’s certification of this defective FEIR, and to reverse the decision to adopt the RTP/SCS that was made based on it.

Dated: June 27, 2012

Respectfully Submitted,

KAMALA D. HARRIS
Attorney General of California

/s

TIMOTHY R. PATTERSON
Supervising Deputy Attorney General

/s

SUSAN L. DURBIN
Deputy Attorney General
*Attorneys for Intervenor
People of the State of California ex rel.
Kamala D. Harris, Attorney General*

SD2012950048
70588139.doc